Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	MM Docket No. 01-317
Definition of Radio Markets	MM Docket No. 00-244

To: Chief, Media Bureau

COMMENTS OF

SALEM COMMUNICATIONS CORPORATION

Salem Communications Corporation ("Salem"), by and through its attorneys, hereby submits these Comments in response to the Notice of Proposed Rulemaking, released on November 9, 2001, DA 01-329 ("NPRM"), in which the Commission requested comments on a wide range of topics relating to its local radio ownership rules and policies. In the NPRM, the Commission announced that it intended to "undertake a comprehensive examination of [its] rules and policies concerning local radio ownership." *NPRM*, ¶ 19.

Many other parties will undoubtedly provide comments on the wide-range of topics raised in the NPRM. Salem wishes to provide its Comments on one discrete issue. Specifically, Salem herein addresses the prohibition of the consideration by the Commission of alternate assignees and transferees as set forth in Section 310(d) of the Communications Act of 1934, as amended, when it is processing an assignment or transfer application.

BACKGROUND

Salem Communications Corporation, through its subsidiaries, owns and operates over 80 radio stations, including 56 stations in the top 25 markets. Some of its recent acquisitions have occurred in the course of, and as byproducts of, transactions between other radio station owners. In those transactions, the parties were ordered to spin-off certain stations to comply with the rules of the FCC, and/or requests made by the Merger Task Force of the Department of Justice, in order to secure governmental approval of the transactions.[1]

From these experiences, Salem has become aware of a practice by DOJ in certain of these spin-off cases, whereby DOJ has evaluated potential spin-off purchasers on criteria essentially boiling down to the likelihood of format continuity and its expected consequences, including maintenance of audience size and demographic characteristics and market revenue share. In these circumstances, and with these criteria in mind, DOJ has sometimes declined to approve the spin-off of stations to purchasers selected by the parties to the main transaction, notwithstanding that the rejected purchasers were in every respect legally qualified to be the licensees of the spun-off stations.

Instead, DOJ has declined to permit a spin-off due to concerns that the proposed assignee of the spin-off would not maintain the same format or audience share. In other cases, DOJ has declined to grant a spin-off to a party that it did not believe could maintain the same revenue share as the assignor. In these cases, DOJ has directed the parties to locate a new spin-off purchaser that would satisfy its standards. In essence, DOJ has compared the proposed spin-off purchaser with a hypothetical purchaser who would be willing to assure DOJ that an existing format would be maintained, or is seen by DOJ as more likely to maintain a format which would garner the same audience size, demographics, and revenue share.

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[1] For example, Salem acquired eight stations from Clear Channel as part of the merger between Clear Channel Communications, Inc. and AMFM, Inc. Clear Channel and AMFM, Inc. agreed to spin-off over 100 stations to secure DOJ and FCC approval for their mergers.

As discussed more fully below, such practices by the Commission are specifically prohibited under Sections 310(d) and 326 of the Communications Act. While the Commission has a history of attempts to compare a legally qualified assignee with a real or hypothetical alternative assignee, or to channel the assignment of a license to a buyer seen by the Commission as likely to continue a station's operation and format in the mode of the assignor, in each case the Commission has ultimately been told by Congress or determined itself that such considerations are counter to the public interest.

DISCUSSION

The Commission has modified its review of assignment applications[2] on several occasions over the past 60 years. At several different times, the Commission has attempted to direct the choice of an assignee, based variously on consideration of competing applications, the buyer's choice in format, or, most recently, the buyer's likelihood of emulating the existing operations of the broadcast station.

Specifically, during a period between 1945 and 1952, the Commission would initiate a comparative hearing between the proposed assignee specified in the application, and any other party that filed an application during the filing period.[3] This controversial policy, however, was eliminated in 1952 by congressional action.[4] Congress modified the language of Section 310(b), later re-designated 310(d), to prohibit the comparison of parties in assignment cases. In adopting the legislation, Congress stated that "in applying the test of public interest, convenience, and necessity,

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2 Although a broadcast license may be acquired through the filing of an Assignment of License application (FCC Form 314) or a Transfer of Control application (FCC Form 315), for the ease of reference, all such acquisitions shall referred to as assignments.

3 *See Powel Crosley, Jr.*, 11 FCC 1 (1945)(establishing the application process to encourage third-parties to file an expression of interest in the station).

4 1952 U.S.C.C.A.N. 2234 (July 16, 1952).

the Commission must do so as though the proposed assignee was applying for the construction permit or station license and as though no other person were interested in securing such permit or license." *Id.* at 2246. This amendment of Section 310(d) added this provision:

> Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Thus, until 1968, it was clear that the Commission could not, because of the Section 310(d) prohibition, consider any factors other than whether the sale of the license to the proposed assignee was in the "public interest, convenience, and necessity." In this context, therefore, the Commission's only permissible examination of a proposed assignee was to determine whether it was legally qualified to hold a broadcast license, *e.g.*, whether there were any disqualifying factors such character issues, alien ownership, and compliance with the local radio ownership limits.[5]

At about that time, the Commission began receiving complaints from listeners relating to proposed assignments which centered on whether the proposed assignee would continue providing the same format as the current licensee. The filing of these "format" cases resulted in a series of Court of Appeals decisions holding that the Commission must review whether the proposed assignee would change the format of the station.[6] In response, the Commission issued a Policy Statement, in which it said that it would no longer designate for hearing those assignment

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5 *See MMM Holdings, Inc.*, 4 FCC Rcd 6838 (1989), *aff'd* 4 FCC Rcd 8243 (1989). The Commission stated that:

> The legislative history of this part of Section 310(d) thus appears to indicate that Congress intended the Commission to determine whether the proposed transferee possesses the basic qualifications required of licenses, but that it should not indulge in comparative analyses between the transferee and others, including the existing licensee.

Id., 4 FCC Rcd at 6839.

6 *Citizens Committee to Save WEFM, Inc. v FCC*, 506 F.2d 246 (1974); *Citizens Committee to Keep Progressive Rock v FCC*, 478 F.2d 926 (1973); *Lakewood Broadcasting Service, Inc. v FCC*, 478 F.2d 919 (1973); *Hartford Communications Committee v FCC*, 467 F.2d 408 (1972); *Citizens Committee to Preserve the Voice of the Arts in Atlanta v FCC*, 436 F.2d 263 (1970).

applications where the sole basis was a change in format.[7] The Court of Appeals overturned the Policy Statement, but it was reversed by the Supreme Court which upheld the Commission.[8] The Court affirmed the Commission's conclusion that, in reviewing a proposed assignee, the analysis under Section 310(d) could not include such factors as proposed format changes.[9]

While the "format" doctrine was being reviewed, the Commission adopted the *Wichita-Hutchinson* doctrine, which held that the Commission would review a proposed assignment to determine whether the action "would result in service or other conditions substantially inferior to the existing operation."[10] The Commission determined that Section 310(d) did not apply, since "the comparison prohibited by that section is not between the transferor and the proposed transferee, but between the proposed transferee and some third person other than the transferee proposed in the application."[11]

This doctrine remained in force until 1989, when the Commission found that Section 310(d) could not "be said to require transferee/transferor comparisons."[12] Such comparisons, the Commission found, "severely restrict and delay the transferability of licenses... penalize licensees who have provided exemplary service... and... encourage licensees to diminish their level of service." *Id.* at 8244.

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7 *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858, ¶ 21 (1976), *rev'd FCC v. WNCN Listeners Guild*, 610 F.2d 838 (1979), *rev'd sub nom*, 450 U.S. 582 (1981).

8 450 U.S. 582, 602 (1981).

9 *Id.* Moreover, Section 326 of the Communications Act has been interpreted to bar the FCC from "interfering with licensee discretion in programming." *Pacifica Foundation v. FCC*, 556 F2d 9, 14 (1977)(citing *Writers Guild of America West, Inc. v. FCC*, 423 F.Supp 1064 (C.D. Cal. 1976). Clearly this prohibits the Commission from extracting format maintenance commitments from an assignee.

10 *Minneapolis Star and Tribune Co., et al*, 19 FCC 2d 433 (1969), *recon denied*, 20 FCC 2d 584, 586 (1969), *transfer denied*, 20 FCC 2d 951 (1969).

11 20 FCC 2d at 586. The Commission did carve out an exception with respect to common carrier transfers. *CNCA Acquisition Corp.*, 3 FCC Rcd 6088 (1988).

12 *MMM Holdings, Inc.*, 4 FCC Rcd at 8244 (1989).

From this overview, then, it is clear that the Commission is not permitted to compare the proposed assignee with (i) the assignor; or (ii) any third party, when reviewing an assignment application. Specifically, the Commission is prohibited under Section 326 of the Communications Act from considering the format of any other party, and Section 310(d) narrowly tailors the Commission's ability to review the proposed assignee unless it is clear that a grant of the assignment would not be in the public interest, and completely prohibits the Commission from considering third parties, both real, identified third parties, and hypothetical, idealized third parties.

An example set in the future, after the conclusion of this proceeding, may best illustrate Salem's concern. For this example, we assume that the Commission, at the conclusion of this proceeding, adopts a set of rules and policies elaborating on the numerical categories of Section 73.3555, addressing concerns about diversity and competition. After these rules and policies are in place, Group Owner X enters into transactions to acquire additional stations. Its asset purchase agreements look toward station acquisitions which earn a "flag," evidencing FCC competitive concerns under its new rules and policies. In its review, the FCC determines that it would permit Group Owner X to purchase all but one of the stations it has contracted to acquire. To gain FCC approval, Group Owner X must spin-off the right to purchase the top ranked adult contemporary radio station in the market.

Although Example Broadcasting reaches agreement with Group Owner X on the terms by which Example would acquire the spin off (it sees the strong FM station as the home for a new format, classical music), the FCC expresses grave concern since the station will lose its format identity, and may well lose its significant share of the market's audience and revenues. The FCC refuses to approve Example as the spin-off purchaser. Without completing the spin-off, Group Owner X can not gain approval of its overall transaction. The FCC leaves Group Owner X with no

practical choice but to a purchaser who pledges to maintain the station's format and marketing plan, in exchange for the grant of the overall transaction.

Salem believes it is clear that the Commission is prohibited by Sections 310(d) and 326 of the Communications Act from acting on proposed spin-offs as the above case study hypothesizes it might. Instead, the Commission must, in keeping with the statute, and its determination in *MMM Holdings*, examine only whether the proposed assignee "possess[es] the basic qualifications required of licensees."[13]

Therefore, in its order concluding this rulemaking proceeding, Salem respectfully requests that the Commission affirm that:

1. The Commission is prohibited from considering format and revenue share comparisons between the assignor and the proposed assignee;
2. The Commission is prohibited from considering format and revenue share comparisons between the proposed assignee and any other third party, real or hypothetical; and
3. In reviewing assignment applications, the Commission's only valid concern would be whether the proposed assignee qualifies to hold an FCC license in compliance with its rules and policies.

In short, the Commission may not refuse to approve a proposed spin-off to a purchaser on grounds that the proposed purchaser would be unlikely to maintain an established format or the audience share, demographics and market revenue share of the spin-off station.

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13 *MMM Holdings*, 4 FCC Rcd at 6839. In regard to a spin-off purchaser's basic qualifications, if the Commission were to adopt a rule barring one entity from owning stations having greater than a fifty percent share of market revenues, the spin-off purchaser would of course be subject to that rule.

CONCLUSION

The Commission must remain cognizant of the wholesome restraints codified in Sections 310(d) and 326, and adopt rules and policies in this proceeding which are entirely consistent with the statute. In this way, the Commission can ensure that the public interest has been served.

Respectfully Submitted,

SALEM COMMUNICATIONS CORPORATION

By: _____

James P. Riley
Lee G. Petro

Of

Fletcher, Heald & Hildreth PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209-3601
(703) 812-0400 – Phone
(703) 812-0486 – Telecopier

Its Attorneys

March 27, 2002